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No. 88-905

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

v.

BOB MARSHALL ALLIANCE, ET AL.,
and
DONALD P. HODEL, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS BOB MARSHALL ALLIANCE, ET AL. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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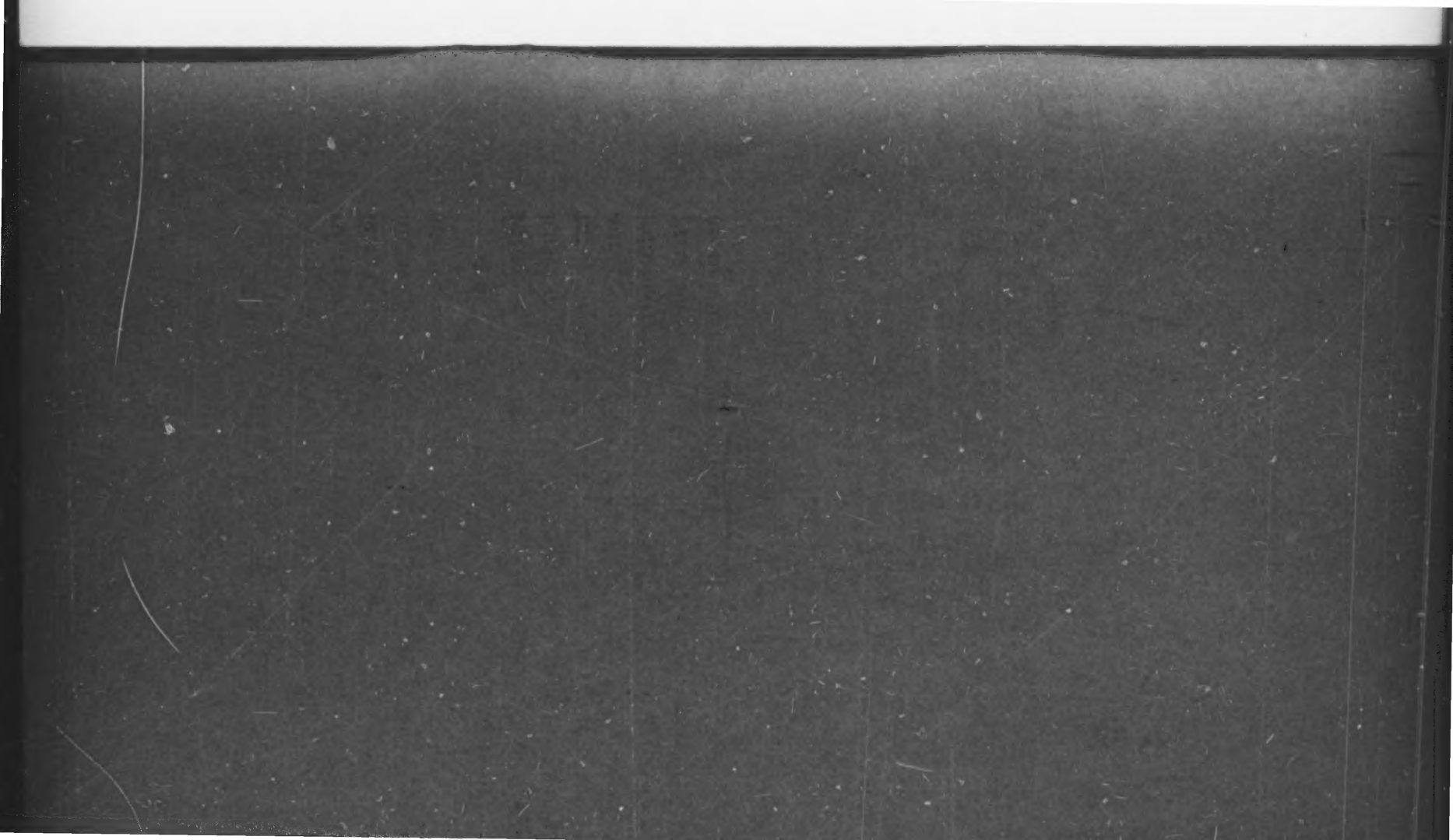

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the ruling of the court of appeals that issuance of oil and gas leases triggers NEPA's requirement for an environmental impact statement unless the leases are subject to a no-surface-occupancy stipulation?

2. Should this Court grant certiorari to review the ruling of the court of appeals that issuance of oil and gas leases triggers the Endangered Species Act's requirement for a comprehensive biological opinion where the Fish and Wildlife Service concludes that leasing without this information "is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species"?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bob Marshall Alliance and The Wilderness Society (hereafter collectively, Bob Marshall Alliance) respectfully request the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Bob*

Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988) (App. 1-19).[1]

RESPONDENTS' STATEMENT OF THE CASE

This case involves the proper application of the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, to the issuance of oil and gas leases. The nineteen leases in question were issued in 1982 by the Bureau of Land Management (BLM) pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, in a roadless area known as Deep Creek, located within the Lewis and Clark National Forest in Montana.

The Deep Creek Further Planning Area (Deep Creek) comprises about 42,000 acres of wild and remote, mountainous terrain. It is bounded on the west by three designated wilderness areas aggregating 1,482,000 acres, which are administered by the United States Forest Service (Forest Service), and on the east by three BLM wilderness study areas. App. 21. The geology of the area offers spectacular scenery including a dramatic series of steep escarpments and deep parallel valleys which separate the Rocky Mountains from the northern high plains. *Id.* The eastern faces of the parallel north-south trending ridges are vertical fault scarps of grey-white Madison

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[1] "App." refers to the Appendices to the petition for writ of certiorari filed on behalf of petitioner Paul C. Kohlman. "Resp. App." refers to the Appendix to respondents' brief, filed herewith.

limestone, the tops of which tower as much as 4,000 feet above the surrounding valleys. *Id.* Castle Reef and Chute Mountain on Deep Creek's eastern edge, facing the Northern Plains, are visible from the prairie for dozens of miles. *Id.*

Deep Creek's wildlife resources are extraordinary. It is an important refuge for four threatened or endangered species: the grizzly bear, the gray wolf, the peregrine falcon, and the bald eagle. App. 6, 22. Deep Creek is also home to abundant populations of Rocky Mountain bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion. App. 7, 21.

Recreational use of Deep Creek by fishermen, hikers, hunters and campers is substantial, due to the proximity of Forest Service campgrounds and cabins, guest ranches and commercial outfitters. App. 22. Several streams with pristine water quality and significant sport fishery value run through the area. *Id.*

Deep Creek also offers the potential for resource development. The area is located in the Overthrust Belt, a geologic zone extending from Canada to Mexico in which major discoveries of oil and natural gas have been made. App. 7.

Between 1977 and 1979 the Forest Service conducted a comprehensive review of 62 million acres of roadless national forest lands pursuant to the Wilderness Act of 1964, 16 U.S.C. §§ 1131 *et seq.*, to determine which areas should be recommended for wilderness designation. App. 7, 22. Through this Roadless Area Review and Evaluation ("RARE II") process, the Forest Service classified areas as either wilderness, nonwilderness, or further

planning. *Id.* Areas allocated to the wilderness category were recommended to Congress for inclusion in the National Wilderness Preservation System. App. 22, fn. 1. Further planning areas are closed to land uses that might reduce the land's wilderness potential, pending the development of management plans which will recommend whether such areas should be included by Congress in the Wilderness System. App. 7.

Because of its outstanding scenic and ecological values, Deep Creek was awarded the highest possible RARE II wilderness rating – a "perfect score" on the Wilderness Attribute Rating System. App. 7, 22-23. Yet due to its potential but undetermined oil and gas resources, Deep Creek was designated a further planning area. *Id.*

Following this designation, BLM received sixteen applications for oil and gas leases on Deep Creek. App. 8. Under an agreement with BLM, the Forest Service prepared an environmental assessment (EA) of Deep Creek and concluded that such leasing would have no significant effect on the quality of the human environment. *Id.;* App. 23. This finding purported to absolve the agencies of the need to prepare an environmental impact statement (EIS) on the sale of the leases. *Id.*

The Forest Service also requested formal consultation with the United States Fish and Wildlife Service (F&WS) under section 7 of ESA, 16 U.S.C. § 1536. App. 8, 38. To that end, the Forest service submitted a biological evaluation (BE) of Deep Creek to the F&WS as required under

ESA and applicable Forest Service and F&WS regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12-402:14; Forest Service Manual § 2671.44(c). In its BE, the Forest Service admitted that it had failed to gather necessary information about the environmental conditions of the area:

> A field evaluation [of Deep Creek] was not undertaken at this time. [BE, p. 1.][2]
>
> * * *
>
> Specific bear use patterns for the study area are not available . . . . [BE, p. 6.]
>
> * * *
>
> Specific wolf use patterns for the study are are not known. [BE, p. 7.]
>
> * * *
>
> [I]ntensive raptor surveys have not been completed. [*Id.*]
>
> * * *
>
> Specific eyerie locations, or cliff suitabilities for the peregrine falcon have not been identified in the study area . . . . [N]esting attempts could [be] occurring now and not [have been] identified because of the lack of intensive surveys. [BE, p. 9.]

For these reasons, the Forest Service acknowledged that it had

> insufficient resource inventory information at this time to identify specific areas for surface occupancy timing or area restrictions for T&E species considerations. [BE, p. 11.]

Because the Forest Service's BE was inadequate, the F&WS was unable to prepare a comprehensive biological

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[2] Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court the Forest Service's Biological Evaluation.

opinion on the potential impacts of lease activities on the protected species which inhabit Deep Creek. App. 8, 38. The F&WS noted this deficiency and warned against the issuance of leases without adequate environmental review:

> Both biological data and project information are lacking for the entire action. Your BE [Biological Evaluation] states that 'there is insufficient resource inventory information at this time to identify specific areas for surface occupancy timing or area restrictions for threatened and endangered species consideration.' Your EA also states that *'it is not possible at this time to identify all important wildlife habitats which would preclude specific lease activities.'* In order to remain in compliance with Section 7(a)(2), *the Forest Service must initiate the necessary research/surveys/inventories to acquire the biological data and obtain biological opinions on each of the incremental steps as they arise.* . . .[F&WS op., p. 4, emphasis added.][3]
>
> * * *
>
> Leasing with *little or no information on key habitat components and use patterns for the listed species* in the Deep Creek area is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species. *[Id.,* p. 5, emphasis added.]

The impact of oil and gas exploration on Deep Creek's threatened and endangered species without adequate prior consultation under ESA could well be catastrophic. Eight of Deep Creek's drainages could be

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[3] Pursuant to Supreme Court Rule 19.1, respondents have asked the district court below to certify and transmit to this Court the F&WS biological opinion letter.

roaded, including four of the five best grizzly habitats. BE, pp. 1 and 6. The potential ESA conflicts are extreme:

> Even though only 25% of the study area is suitable for occupancy activities, those areas available for occupancy use are, for the most part, the drainage bottoms which could increase the potential conflict in the higher quality grizzly and wolf habitats. . . . [O]il and gas activity occurring at the same time in adjacent drainages could reduce the solitude, refuge habitat [sic] available to the grizzly or wolf over large areas of the study area. . . . [*Id.*, p. 9.]

> *Stream bottoms are recognized as an extremely important habitat component of the grizzly bear. Despite the Forest Service requirement that riparian habitat be avoided oil and gas activities and its [sic] associated road use certainly has the potential to displace bears from these areas* . . . . [F&WS op., p. 4, emphasis added.]

> The greatest effect associated with oil and gas activities upon the peregrine falcon and bald eagle is the potential to preclude future occupancy of suitable but unoccupied habitat because of associated disturbance activities . . . . All phases of oil and gas activity could preclude peregrine nesting. . . . The greatest potential for conflict [with the Bald Eagle] is along the three potential access corridors which cross the delineated Essential Habitat. . . . [BE, pp. 9-10.]

These very serious risks demanded a prompt and comprehensive biological assessment. As the F&WS observed,

> *[W]aiting until completion of a project specific evaluation to generate the biological data may result in* . . . areas being leased for surface occupancy that in fact have no opportunity for surface occupancy due to *irresolvable conflicts with wildlife resources.*

> Early identification of the potential conflict areas so that sound planning on a regional basis can be initiated would provide a more positive approach.
>
> *[D]ue to the large home ranges of both the grizzly and wolf, identification of their habitat components over a large area is required in order to project use patterns.* The projection of use patterns over a large area is required in order to coordinate the proposed activity and other ongoing activities with the biological requirements of the wolf and bear. . . . *[T]he required information may not be available to accomplish this objective if a "piecemeal" approach of identifying habitat components on individual sites at the time they are proposed is followed.* [F&WS op., pp. 4-5, emphasis added.]

Yet the Forest Service chose a path of procrastination, not examination, of these environmental concerns. App. 33.

Despite its advice that leasing without adequate environmental review would "set the stage" for conflicts with ESA, however, the F&WS reluctantly deferred to the Forest Service's legal position that "leasing" was merely a paper transaction which by itself would not jeopardize the protected species. App. 8, 38; F&WS op., pp. 2-3. But the F&WS made clear that it was not making an informed judgment about the effects of *exploration activities*, but simply acceding to the Forest Service's legal position concerning the effect of "leasing." *Id.*, p.1. Furthermore, F&WS explicitly premised its agreement on the assumption that, to "assure compliance with [ESA] Section 7(a)(2)," the Forest Service would undertake the following studies "prior to the receipt of specific applications for exploration/development permits":

(1) Surveys to determine the use or non-use of the Deep Creek leasing area by bald eagles and peregrine falcons.

(2) Surveys, inventories, or research necessary to identify the key habitat components for listed species in the Deep Creek leasing area.

(3) Identify the use patterns listed species portray in the Deep Creek lease area. [F&WS op., pp. 5-6.]

The F&WS also stressed that these studies

> *should occur prior to leasing* so that the information obtained can be used in the decision making process as to whether an area should be excluded from leasing, leased with 'no-surface occupancy,' or leased with surface occupancy allowed, and which Appendix B stipulations are applicable to the lease. [*Id.*, p. 6, emphasis added.]

But the Forest Service ignored this expert advice.

Commencing in January 1982, BLM issued the sixteen leases for which applications had been received, along with three additional leases awarded through a lottery system. App. 8. Collectively, these leases cover all of the land within Deep Creek. *Id.* Four of the leases contain no surface occupancy ("NSO") stipulations covering the entire leased acreage; some of the others contain NSO stipulations covering part of the leased acreage. App. 11-12. Although the leases contain other kinds of stipulations, only the NSO stipulation purports to empower the government to prohibit any and all lease activities that might significantly affect the environment, the threshold test for preparation of an EIS. Even assuming the NSO stipulations are effective to prevent all surface disturbance absent further agency approval,[4] the Forest Service

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[4] The question whether these NSO stipulations are effective has not been decided by the courts below. The Ninth Circuit remanded this issue for determination by the district court. App. 12, fn. 3.

admits that the non-NSO leases allow surface occupancy activities in eight of Deep Creek's ten drainages. BE, pp. 1, 8.

The impacts of the exploration activities allowed under the leases are severe. Exploration involves construction of roads, drill pads, mud pits and related facilities. Because of the extreme depth (at least 10,000 feet) of the suspected oil and gas deposits, heavy drilling equipment which cannot be transported by helicopter is required. Resp. App. 1. Therefore access roads would be constructed. BE, p. 4. Each drillsite at Deep Creek would be more than double the size of a football field to accommodate the drill rig, mud pit, generators, drill pipe baskets, office and housing trailers, vehicles, stockpiled earth and other support facilities. The Forest Service admits that "at least" fifteen such sites would be constructed. *Id.* Because of the steep and fragile character of the terrain, significant cutting and filling, and resultant scarring of the landscape, would result from these exploration activities. App. 34; Resp. App. 6.

Accordingly, *the Forest Service admits that exploration activities alone, even assuming no commercial development and production takes place, would reduce Deep Creek's wilderness rating from a pristine value of 28 to a mediocre level of 19 points for a period of 3 to 20 years.* App. 28. And if all the lessees undertake exploration, according to the government, "[i]t is unlikely that Deep Creek can be reclaimed to its existing 'natural condition' within 20 years."[5] The

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[5] Interior Secretary James Watt's Answer to Plaintiffs' Request for Admission No. 10, filed January 10, 1983. Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court Secretary Watt's responses to respondents' discovery below.

Montana Department of Fish and Game concluded that the proposed exploration roads "would constitute a major threat to wildlife and wilderness values," and that if the exploration allowed by the leases occurs, "the site can never return to the natural landscape." Resp. App. 6.

Less tangible but just as pervasive as the physical alteration of Deep Creek would be the impact of greatly increased human presence in this remote region. An exploratory drill rig requires the services of up to 50 workers on a round-the-clock, seven-days-a-week schedule. According to the F&WS's biological opinion, the continuous human activity resulting from oil and gas exploration of Deep Creek would have the potential to displace the grizzly bear from the area. F&WS op., p. 4.

Because issuance of the subject leases violated NEPA and ESA, in February 1982, following a series of administrative appeals of the Forest Service and BLM lease approvals, Bob Marshall Alliance brought this action. Specifically, Bob Marshall Alliance alleged that NEPA required preparation of an EIS prior to issuance of the leases (42 U.S.C. § 4332(2)(C)); that the defendant agencies failed to "study, develop and describe" the alternative of not issuing leases in order to preserve the wilderness character of the area (42 U.S.C. § 4332(2)(E)); that the leases would impair the wilderness character of Deep Creek in violation of Forest Service regulations; and that the consultation process mandated by ESA had not taken place (16 U.S.C. § 1536). App. 9.

The district court granted summary judgment for Bob Marshall Alliance on May 27, 1986. App. 20-41; *Bob Marshall Alliance v. Watt*, 685 F.Supp. 1514 (D. Mont.

1986). The court held that the leases represented an irretrievable commitment of resources triggering the need for an EIS under NEPA and the Forest Service's regulations; that the agencies violated NEPA by failing to give meaningful consideration to the no-leasing alternative; and that the government had failed to conduct an adequate assessment and consultation regarding the leases' impact on threatened and endangered species. App. 25-41. Accordingly, the court set aside the leases as contrary to law and enjoined the agencies from issuing any further leases in Deep Creek pending compliance with NEPA, ESA and agency regulations. App. 41.

Petitioner Paul C. Kohlman and federal respondents Donald P. Hodel, et al. appealed from the district court's decision. They contended that the leases did not constitute an irrevocable commitment of environmental resources, and therefore NEPA and ESA could be satisfied by a subsequent series of "staged consultations" and environmental reviews tiered to specific exploration and development activities. App. 9-10. The Ninth Circuit affirmed the district court's ruling in large measure, save only those leases which absolutely prohibited surface disturbance in the absence of specific governmental approval – i.e., "NSO leases." App. 12. The appeals court reasoned, consistent with the leading cases on point, *Conner v. Burford*, 848 F.2d 1441, 1446-1451 (9th Cir. 1988) and *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983), that *either the government must retain full authority in the leases to disapprove lease activities based on future environmental reviews, or the required review must take place before the leases are issued.* App. 10-12.

The federal defendants-respondents have accepted the well-reasoned decision of the Ninth Circuit and apparently intend to comply therewith. Of all the governmental and lessee parties to this processing, only one, petitioner Paul C. Kohlman, seeks review by this Court.

REASONS FOR DENYING THE WRIT

There is no basis for granting certiorari in this case. The Ninth Circuit's decision allows staged NEPA review of oil and gas leases and is consistent with the rulings of the other circuits on this issue. The government has therefore decided to comply with the Ninth Circuit's ruling and does not seek this Court's review. Petitioner, by contrast, seeks to evade effective NEPA review of oil and gas leases. Furthermore, there are two independent bases for the Ninth Circuit's decision to set aside the leases which petitioner does not challenge. Therefore no ruling by this Court could revive these leases. Certiorari accordingly must be denied.

In urging this Court to grant certiorari in this case, petitioner portrays the court of appeals' ruling as one that departs from the established principle of "staged" NEPA review adopted by the Tenth, District of Columbia, and Ninth Circuits. Nothing could be further from the truth. The court below *reversed* the district court's refusal to allow staged review, holding that such review was entirely permissible *where the government specifically reserved authority in the leases to disapprove lease activities based on future environmental reviews*. App. 11. The problem with most of the leases in the instant case was that

they did *not* reserve this authority. Rather, the non-NSO leases would curb environmentally harmful activities only to the extent they were "not *necessary* for the full enjoyment" of the lease. In issuing the non-NSO leases, the Interior Secretary was quite explicit on this point:

> Under the general authority contained in section 4 of each lease, and the specific authority contained in the various stipulations, the lessee may be precluded from surface occupancy of some or all of the leased premises *if the proposed surface occupancy is not necessary for the full enjoyment of the right* to drill for, mine, extract, remove and dispose of all oil and gas deposits, except helium gas, in the leased lands, such as through the use of directional drilling from adjacent property owned or controlled by the lessee.[6]

Obviously, if only *un*necessary surface occupancy may be precluded by the government, the lessee is free to engage in all surface occupancy activities which are "necessary for the full enjoyment of the right to drill for, mine, extract, remove and dispose of all oil and gas deposits." Thus, issuance of the non-NSO leases was an irretrievable commitment of environmental resources which triggered the need for an EIS. None of the authorities on which petitioner relies suggests otherwise.

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[6] Interior Secretary James Watt's Supplemental Answer to Plaintiffs' Interrogatory No. 9, filed January 10, 1983, emphasis added. Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court Secretary Watt's responses to respondents' discovery below.

Thus contrary to petitioner's claim, there is no "conflict" between the Ninth, Tenth and District of Columbia Circuits over the proper approach to examining the environmental effects of oil and gas leasing. These circuits agree that the timing of EIS preparation on oil and gas leasing is not mechanically determined by application of some preconceived assumptions, as petitioner suggests. Cert. Pet., pp. 6-7. Rather, the circuits hold that the timing of an EIS is determined on a case-by-case basis depending on two factors: (1) *whether the lease approval represents an irretrievable commitment* of resources; and (2), *whether the potential environmental impacts are significant.* If the first factor is absent and the government retains full authority to prohibit future resource impacts, as in the case of NSO leases, then no EIS is necessary even though the second factor is present: the government may defer preparation of an EIS until sufficient data on specific exploration activities is gathered. In the latter case, an EIS is required only at that stage where the government makes an irrevocable commitment of environmental resources.

Thus, in *Bob Marshall Alliance* and *Conner v. Burford, supra,* the Ninth Circuit held no EIS is required for issuance of NSO leases. App. 10-12; 848 F.2d at 1447. The D.C. Circuit reached precisely the same conclusion in *Sierra Club v. Peterson, supra.* Its opinion, in which Justice Scalia of this Court joined, is particularly cogent on this point and is, therefore, quoted at length:

> NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The purpose of an EIS is to insure that the agency considers all possible courses of action and assesses the environmental consequences of each

proposed action. . . . Therefore the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options. [Citations omitted.] An EIS is required when the "critical agency decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment. [Citation omitted.] On the facts of this case, that "critical time," insofar as lands leased without a NSO Stipulation are concerned, occurred at the point of leasing. Notwithstanding the assurance that a later site-specific environmental analysis will be made, in issuing these leases the Department made an irrevocable commitment to allow *some* surface disturbing activities, including drilling and roadbuilding. While theoretically the proposed two-stage environmental analysis may be acceptable, in this situation the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences.

The Department asserts that it cannot accurately evaluate the consequences of drilling and other surface disturbing activities until site-specific plans are submitted. If, however, the Department is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable. If the Department chooses not to retain the authority to *preclude* all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment – when the leases are issued.

> The Department can decide, in the first instance, by which route it will proceed.

717 F.2d at 1414-15, emphasis in original.

Contrary to petitioner's claims, the Tenth Circuit's ruling in *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) does not conflict with *Bob Marshall Alliance*, *Conner* and *Peterson*. In *Park County*, as in the Ninth and D.C. Circuit rulings, the court focused on the government's reservation of authority to disapprove future surface-occupancy activities. It upheld issuance of an oil and gas lease without prior preparation of an EIS precisely *because* the lease "required [the government's] prior approval . . . before any surface-disturbing actions, such as drilling." 817 F.2d at 613. And indeed, an EIS was prepared on the drilling permit issued on that lease. *Id.*

In summary, petitioner's contention that the ruling below is out of step with established NEPA principles is not supported by the very decisions on which petitioner relies. To the contrary, it is plain that the Ninth Circuit's ruling is not only correct under the facts of this case, but squarely in the mainstream of NEPA law.

It is equally plain that petitioner's agenda has nothing to do with promoting careful and responsible resource decisionmaking. Petitioner's real agenda is to immunize oil and gas lease activity from NEPA review, for petitioner urges not only that initial lease issuance be exempt, but also that all subsequent permitting activity be exempt as well. It complains that even where an EIS is not required before leasing – as where an NSO stipulation

is included – under the Ninth Circuit's ruling the lessee would be burdened by post-lease NEPA review:

> Under this procedure [upheld in *Bob Marshall Alliance*], the Ninth Circuit found that the government could issue the lease without an EIS; but it must retain the right to prohibit all surface disturbing activity. *Id.* Future decisions would allow or disallow surface disturbing actions, and EISs must accompany those decisions. *In effect, each time the lessee applied for a permit he would risk losing his lease.*

Cert. Pet., p. 10, emphasis added.

Petitioner cannot have it both ways. NEPA requires that lease activities be reviewed – and possibly disapproved – either before lease issuance, or at the post-lease, permitting stage. Petitioner has no right to engage in oil and gas leasing activities on federal land without subjecting itself at *some* point to the environmental reviews and discretionary approvals mandated by Congress. Because petitioner urges otherwise, its position is without merit. Therefore, its petition should be denied.

There are several other, equally compelling reasons to deny petitioner's request for certiorari. First, the very government agencies whose lease decisions were set aside have decided not to seek review of the Ninth Circuit's decision, and have elected instead to conform their leasing practices to the court's well-reasoned, fair and sensible approach. No purpose would be served by unsettling their decision to follow what has been mainstream NEPA law for many years.

Second, there is an independent basis for the Ninth Circuit's decision to set aside the subject leases which petitioner does not challenge. The court below held that

the government had a statutory duty, pursuant to Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), to "study, develop and describe" alternatives to leasing. This duty is entirely independent from the EIS requirement of Section 102(2)(C), 42 U.S.C. § 4332(2)(C). App. 13-17. This duty arises where recommended actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The Deep Creek leases pose such conflicts, for as the Ninth Circuit noted, "the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate beomes ineffective." App. 16, fn. 4. Because the government failed to consider meaningfully the no-leasing alternative, all of the subject leases were set aside. Petitioner does not challenge this ruling, and is therefore bound by it. No ruling by this Court can revive these leases. Petitioner's request for ceritiorari must therefore be denied.

Finally, the government's compliance with ESA is admittedly deficient. The Forest Service conceded that it had failed to gather essential information concerning the threatened and endangered species which inhabit Deep Creek. See discussion on pages 5-6, *supra*. The F&WS agreed that the Forest Service's Biological Evaluation was inadequate. See discussion on pages 6-9, *supra*. Agency failure to prepare an adequate biological evaluation is a "substantial procedural violation of ESA." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Because of this failure, all of the subject leases were set aside. No ruling by this Court can cure this fatal deficiency, and resurrect these leases. Petitioner's request for certiorari must therefore be denied.

In sum, there is no reason for this Court to exercise its review powers in this case and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January 30, 1989

Respectfully submitted,

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U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, "ENVIRONMENTAL ASSESSMENT, OIL & GAS LEASING: DEEP CREEK AND RESERVOIR NORTH RARE II FURTHER PLANNING AREA"

7. *EFFECTS OF IMPLEMENTATION*

This section describes consequences of implementing each alternative in terms of environmental changes, outputs and costs.

a. *Givens and Assumptions*

The following givens and assumptions were used in the analysis process.

Givens

1) Leasing would be subject to Standard Stipulations and the RARE II Further Planning Area Stipulation (Appendices A and B).

2) All activity proposals that may result in environmental disturbance will be analyzed through the NEPA process.

Assumptions

1) Discovery would be of natural gas and possibly minor amounts of oil.

2) Any hydrocarbon reservoirs are probably deeply buried (at depths of 10,000 feet or more).

3) At this time it is not possible to drill a wildcat well to depths of 10,000 feet or more without road access. (This is because of the size and weight of equipment used in drilling "deep holes".)

4) Directional drilling beneath "inaccessible" terrain is of very limited feasibility (generally no more than one half mile) because of the complex geological structures involved.

5) Roads will be designed for dry season and single purpose use. Should the lessee desire to use the roads during wet weather, increased levels of maintenance and spot surfacing may be required for resource protection.

6) Exploration road locations will be evaluated with consideration for further road development and improvement should production be approved by subsequent analysis. (Such improvements may be required by production to extend road utility beyond the dry season.)

Resp. App. 3

STATE OF MONTANA

Department of
Fish and Game

Rural Route 4, Box 2
Great Falls, Montana 59405
July 3, 1980

Mr. Darrol Harrison
Acting Forest Supervisor
Lewis & Clark National Forest
P.O. Box 871
Great Falls, Montana 59403

Dear Darrol:

On December 17, 1979 we expressed our concerns to the Lewis and Clark National Forest relating to management direction for oil and gas leasing in the Deep Creek and Reservoir North area. Because of the number and importance of the issues we recommended that an Environmental Impact Statement be prepared. We still feel that anything short of an EIS is inappropriate and violates the intent of NEPA.

We have reviewed the Environmental Assessment and find that it contains contradictions and leaves a number of important questions unanswered.

According to the Lewis and Clark's own assessment and figures, the existing values for wilderness and wildlife are considerably higher than the *potential* for natural gas.

The conclusion that the construction of new roads in the area will not alter its wilderness potential is refuted

by your own data in Appendix 1 which computes "Wilderness Attribute Ratings" before and after roading.

On page 69 under "Effects on Wilderness" it is stated that areas affected by road construction would be limited to where you can "revegetate it with native species." This is directly in conflict with 6(c) and on page 50 where you talk about "seeding with adapted grasses, forbs, and deep-rooted native shrubs," and "a combination of grass, forb, and native shrub and tree species."

On page 3, you conclude that "lease issuance in a further planning area is an action which does not directly result in effects on the environment." This is obviously contrary to a recent court decision of a Beaufort Sea case in which the judge decided that all activities that occur as a result of the lease should be dealt with in an EIS.

In a recent decision relating to water developments in Wyoming, the judge determined that the cumulative impacts of other on-going and potential developments must be considered in an EIS on a specific project. We point this out because of the statement on Page 71 where you talk about "the completion of a thorough Environmental Analysis on a case-by-case basis." In the past, we have always been told that only the impact of the specific action being considered could be dealt with in an EIS.

It is stated on Page 70, "the exploration period during which wilderness attributes could be substantially less than now may last from 3 to 20 years, depending on exploration proposals by the lessees." This statement is somewhat misleading in that it does not go as far as it

should. Table 7 on page 38 indicates that if the development proceeds as far as the development and production stage that the disturbance could last from 30 to 40 years.

In the summary, it is stated that "if the area becomes recommended for wilderness classification, production of oil and gas might still be allowed." This statement appears to conflict with a quote on Page 1 from the RARE II FES (p. 97) that states in part, "a determination on whether national interest requires production of oil and gas *or* whether the area should be included in the wilderness system."

We have met with your personnel on several occasions and discussed problems associated with oil and gas leasing, exploration and development. The position taken by the Forest Service seems to be that since leasing is merely a paper exercise, that there is no appreciable environmental impact out there on the land. We get an entirely different viewpoint on this from industry representatives.

In the vicinity of the Blackleaf Game Range, we have been working with U.S.G.S., BLM and Rainbow Resources, Inc. The Rainbow Resources representative has reiterated to us on several occasions that if the leasing agency has concerns they had better address them before they issue the leases. He feels that when he obtains a lease, he has a binding contract and from then on, he doesn't welcome much interference.

The largest problem we have had to deal with so far in the Blackleaf vicinity has been the location of roads. No acceptable road location has been found to a well site near Muddy Creek.

In the Deep Creek Reservoir North area, we feel access roads would constitute a major threat to wildlife and wilderness values. We agree with the statement made in the Rocky Mountain Front Plan, Parts I and II, page 1-36: "Road construction will cause visual disruption through clearing of vegetation and the exposure of raw dirt. This is a very long term change. Revegetation with grass or native shrubs will soften the abrupt change but the site can never return to the natural landscape."

As pointed out in earlier correspondence, there are some bad examples of sloughing, settling and cracking of some of the "high standard" roads on the Rocky Mountain Front.

Fish, wildlife and wilderness concerns have been communicated to you in previous correspondence concerning the Deep Creek-Reservoir North area. We do not feel the Environmental Assessment adequately addresses these concerns and our position continues to be that an Environmental Impact Statement is essential to properly live up to the intent and spirit of NEPA.

Sincerely,

NELS A. THORESON,
Regional Supervisor